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Issue Date: 16 May 2003

CASE NO.: 2002-LHC-01274

OWCP NO.: 14-135499

In the Matter of

JOHN E. SCHAFFER
Claimant,

v.

CASCADE GENERAL, INC.
Employer,

LIBERTY NORTHWEST INSURANCE CO.
Carrier.

Appearances:

Douglas A. Swanson, Esq.
Swanson, Thomas & Coon
Portland, Oregon
for Claimant

John Dudrey, Esq.
Williams Fredrickson, LLC
Portland, Oregon
for Employer and Carrier

Before: Gerald Michael Etchingham
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

Claimant, John E. Schaffer, filed a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et. seq*. (the "Act"), for injuries suffered on October 1, 1998, while he was working for the Employer, Cascade General, Inc. A formal hearing was held in Portland, Oregon on December 3, 2002. All parties, except the Director of the OWCP, were represented by counsel. The following exhibits were admitted into evidence: Claimant's Exhibits ("CX") 1-21, Employer's Exhibits ("EX") 1-51, and Administrative Law

Judge's Exhibits ("ALJX") 1-6 with ALJX 5 and 6 being Claimant and Employer's respective closing briefs. The parties called witnesses, offered documentary evidence and submitted oral arguments. This Court took the matter under submission and invited post-trial briefs by the parties which were submitted. This Court duly considered the evidence submitted at trial, the admitted exhibits, and the briefs and arguments of counsel.

Claimant argues that the date of injury to his lower back is October 1, 1998 for purposes of determination of average weekly wage ("AWW") under § 910(a), the date that Claimant saw his treating physician, Eric Smith, MD., for his stiff and sore back. Claimant argues that he is entitled to temporary total disability ("TTD") compensation from October 1, 1998 through October 12, 1998 as well as interest for delayed payments for temporary disability benefits. Claimant also argues that he has "psychological barriers" related, at least secondarily, to his compensable back injury. Because of his alleged ongoing back and psychological problems, Claimant argues that he has not yet reached maximum medical improvement status ("MMI"). As a result, Claimant argues that he is entitled to an order awarding ongoing TTD compensation including interest on all accrued compensation and a Section 14(e) penalty assessment of 10% of the balance due from October 1, 1998 to August 10, 2001, the period of time of Employer's controverted AWW and TTD claims for Claimant. Alternatively, if MMI is found to have occurred, Claimant argues that he is either permanently totally disabled ("PTD") or permanently partially disabled ("PPD") depending on whether this Court believes that Employer has adequately proven that suitable alternative employment is available to Claimant. Claimant argues that Employer's forensic vocational expert, Roy Katzen, failed to factor Claimant's psychological barriers into his opinions about suitable alternative employment, and even if he did, Claimant's residual earning capacity does not exceed an entry-level wage adjusted to eliminate the effects of inflation. Finally, Claimant argues that he is entitled to recover his reasonable attorney fees and costs.

Employer maintains that the date of injury for AWW is January 7, 1999, the date that Claimant first signed and submitted a State of Oregon Workers' Compensation form (EX10) referencing his new back injury claim. Moreover, Employer argues that for AWW purposes, the date of injury is March 19, 2001 because Claimant's State of Oregon back injury claim was a "no-time-loss" claim and March 19, 2001, was when Claimant first lost time from work on account of his new injury. Employer argues that AWW should be calculated under § 910(c) and not § 910(a) because Claimant worked only 168 days during the year immediately before March 19, 2001. Employer believes that Claimant reached MMI as of May 4, 2001. Employer further argues that Claimant is permanently partially disabled from his back injury alone and that Claimant has not identified any psychological impediments attributed to his January 1999 back injury. Moreover, Employer argued that vocational expert Katzen took into consideration Claimant's alleged problems interacting with the public and found suitable alternative employment for Claimant in positions of gate guard and cashier which involve "fairly low level of customer contact." Finally, Employer argues that Claimant lacked credibility with respect to his alleged disabilities and his three job evaluations when compared to Claimant's daily activities which include travel, gambling, and hunting and fishing with an unrestricted driver's license. Therefore, Employer argues,

Claimant can work at suitable alternative employment at a wage range of $7 to $10 per hour for a compensation rate of $223.94 to $143.94 per week, less payments made. Moreover, Employer argues that Claimant's reduced weekly wages should commence as of July 9, 2001, after Claimant's light duty employment ended.

I agree with Claimant regarding the date of injury and the calculation of average weekly wage for his first lower back injury. I agree with Employer that May 4, 2001 is the date of maximum medical improvement for the second lower back injury. I also agree with Employer that Claimant has failed to prove that he has any psychological impediments associated with either his back problem or employment. I find that Claimant was not credible with respect to his allegations of work-related disabling psychological problems particularly given Claimant's routine ability to travel, gamble, hunt and fish, drive, and watch television. Claimant is entitled to temporary total disability for the period of October 1, 1998 through October12, 1998. Claimant is also permanently partially disabled from May 4, 2001 through the present as a result of his lower back injury.

STIPULATIONS

The parties have stipulated to the following:

a. The Act applies in this case.
b. Claimant has suffered at least one injury in this case.
c. At the time of the injury in this case, an employer/employee relationship existed between the Claimant and the Employer.
d. The injury arose out of and in the course of Claimant's employment.
e. The claim was timely noticed.
f. The Claimant is entitled to medical benefits.
g. The Employer/Carrier is currently providing medical benefits to Claimant.
h. Claimant has no outstanding unpaid medical bills.
i. Claimant is not working.

TR[1] pp. 5-6.

ISSUES FOR DETERMINATION

The unresolved issues in this proceeding are:

1) Whether there is any causal relationship between both of Claimant's physical back problems and his employment with Employer?

2) Whether there is any causal relationship between Claimant's psychological problems and his employment with Employer?

[1]The abbreviation "TR" refers to the hearing transcript.

3) What is Claimant's Average Weekly Wage for both injuries in 1998 and 2001?

4) Is Employer subject to Section 14(e) penalties for the period from October 1, 1998 to August 10, 2001 when Employer filed its Notice of Controversion?

5) What is the date of maximum medical improvement, if any, regarding the back injury?

6) What is the extent of Claimant's disability resulting from his back injury?

7) What is the extent of Claimant's wage earning capacity, if any?

FINDINGS OF FACT

Claimant was born on October 10, 1945 making him fifty-seven years old at the time of hearing. TR p.21. He worked for Employer from January, 1988 through June, 2001 as a welder/fitter. TR p. 23. The work would go in cycles where there is a lot of work for a month or so and then everyone would be laid off based on the seniority list. TR p. 38. Besides welding, Claimant also worked in Employer's shop operating a lathe, press, and a lot of other different machines. Id. Even in the shop, however, there were times when Claimant would be laid off and called back when work picked up again. Id. At the time Claimant stopped working, he was 12th on Employer's seniority list. TR p. 23. Overall, Claimant had worked on a steady basis for 38 years from 1963 to 2001. TR p. 66.

Claimant reported an industrial injury to his back on June 15, 1996 while working for Employer. TR p. 23. He previously stated that he was injured while leaning over the edge of a rudder with a 9-inch grinder when his back snapped. Claimant was initially treated by Eric Smith, M.D., and reported being sent to physical therapy with no benefit as well as receiving prescriptions for medications. Claimant was later seen by Walter George, M.D., on one occasion when Dr. Smith had transferred clinics. EX 4, p. 138.

A magnetic resonance imaging ("MRI") dated August 12, 1996 revealed evidence of L3-4 degenerative disc disease with retrolisthesis of L3 on L4. EX24, p. 56.

Dr. Smith re-evaluated Claimant for his chronic back pain on April 29, 1997, noting no significant improvement. Dr. Smith discussed his only recommendation as being an epidural which Claimant did not desire.

Dr. Smith re-evaluated Claimant periodically over about six separate occasions for Claimant's chronic discogenic low back pain each time finding no new changes.

Claimant's October 1, 1998 Back Injury

In September, 1998, Claimant had a heavy month of working with a number of days working overtime including weekends. TR pp. 24-27 and CX 5, p.20.

On October 1, 1998, Claimant had a marked flare-up of back discomfort noting he had been working long hours and doing overtime work which Dr. Smith believed was the cause of the flare-up of back pain. TR pp. 26-27. Dr. Smith noted no clear radicular pattern. He prescribed Percocet as Vicodin was not controlling Claimant's back pain. EX44, p. 139.

On October 7, 1998, Dr. Smith noted that Claimant's back pain had improved and he was switched back to Vicodin Extra Strength. He also noted that he would continue to authorize Claimant's time loss until October 12, 1988, and that he anticipated Claimant's release back to work at that time. Id., CX11, p. 56, and EX50, p. 262.

Claimant returned to work on or after October 12, 1998, after being away for two weeks. TR p. 42, CX11, p. 56.

By October 22, 1998, Claimant requested a return to his regular job duties for which Dr. Smith did admonish him regarding the need for taking frequent breaks and stretching and working on range of motion. CX11, p. 56. There is a non-medical followup by Dr. Smith on January 7, 1999 where he notes Claimant was being seen to file a new claim mainly due to a question of who has been covering his prior injury as Employer switched insurance carriers and there were no new medical problems with Claimant at that time. CX11, p.56, EX44, p. 140.

Claimant's March 19, 2001 Second Lower Back Injury

After returning to work in October, 1998, Claimant continued to work his regular job with Employer until April 2001 when he transferred to Employer's Light-Duty Program until June 2001 when the program ended and he stopped working altogether. TR pp. 23, 29, and 30.

Since the October, 1998 back flare-up, Claimant testified that he continued and continues to be bothered by dull and sharp pains in his back. TR p. 27. When his back is not bothering him too bad, he rates the pain as a three on a zero to ten scale, ten being the worst. Id. He stated the pain, at its worst, is an eight or nine. Id.

On March 24, 1999, Claimant is seen by Dr. George. His assessment is status post acute lumbosacral strain and chronic low back pain. Dr. George believed that claimant was not medically stationary, though he did release him to regular work. Claimant was prescribed salicylate, amitriptyline, Atarax, and noted he preferred that Claimant take Extra Strength Tylenol during the day in place of Vicodin. Dr. George also ordered four physical therapy visits for Claimant.

Claimant attended physical therapy on April 1, 1999 at Healthsouth in Vancouver, Washington, where he was evaluated by Brian Gehley, Physical Therapist, on referral from Dr. George. Mr. Gehley noted on April 13, 1999, that subjectively there was no change in Claimant's condition from the therapy although objectively he noted that Claimant was able to rise from a full squat, which was noted to be an improvement. EX44, p. 139.

On April 22, 1999, Claimant follows up with Dr. George whom suggested swimming exercises. EX44, p. 140.

On April 30, 1999, Claimant is assessed by Dr. Smith who notes that Claimant has chronic low back pain secondary to degenerative changes and recent work-related aggravation on January 7, 1999. Dr. Smith further notes that extensive imaging studies including pain films and MRI have shown no neural impingement but a significant amount of degenerative change in the low back. CX11, p. 58.

Claimant continued to regularly follow up with Dr. Smith seeing him on seven occasions through December 22, 1999, all of which there are noted to be no change in Claimant's physical status. CX11, pp. 59- 66.

On January 26, 2000, it is noted Claimant was having more pain in the right lower extremity for which the assessment is mildly increasing sciatic complaints of the right lower extremity but no abnormalities after neurologic assessment. CX11, p. 67.

Claimant continued to follow up with Dr. Smith on March 28, April 27, May 25, June 27, July 24, and August 28, 2000, where Dr. Smith notes some right arm pain and a flare of kidney stones but otherwise notes no change on any of those visits. CX11, pp. 69-74; EX44, pp. 140-41.

On August 11, 2000, John Dipaola, M.D., Orthopedic Surgeon, evaluated Claimant for the purpose of a defense medical examination ("DME"). Dr. Dipaola's impression was chronic low back pain secondary to degenerative arthritis of the spine. Dr. Dipaola commented on the MRI performed on August 12, 1996 showing degenerative lumbosacral disease with bulging at L3-4 and some retrolisthesis of L3 on L4. Dr. Dipaola opined that Claimant's condition was stable and diagnosed him with progressive degenerative disease of the lumbar spine. He further opined that Claimant was dependent on narcotic pain medications, antidepressants, and sedatives and Dr. Dipaola did not believe that all of this medication was entirely necessary noting that Claimant would take anywhere from one and a half to two tablets of Vicodin Extra Strength per day and occasionally up to three per day. Dr. Dipaola also noted that Claimant had very tight hamstrings and poor body mechanics. He also noted that Claimant had little confidence in physical therapy and was not doing the exercises on a consistent basis at home. He recommended that Claimant engage in a home exercise program and believed that Claimant's compliance with the exercise regimen was important and would assist in eliminating some or all of the sedative and

narcotic type medicines. Finally, Dr. Dipaola recommended radiographic studies of Claimant's lumbar spine. EX17, pp. 25-26; EX44, p. 141.

Claimant continued to seek the attention of Dr. Smith thereafter, however, until he moved away. EX44, p. 138.

When Dr. Smith moved away, Claimant was treated by Thomas Dyehouse, M.D., Claimant's current treating physician. Dr. Dyehouse also sent Claimant to physical therapy. His first evaluation of Claimant is dated September 29, 2000 which is a handwritten note briefly detailing Claimant's medical history. His diagnosis was chronic back pain, okay to continue current regimen with note in chart not to fill Vicodin Extra Strength more than 40 tablets per month. EX18, p. 27.

There were regular follow-ups with Dr. Dyehouse in October, November and December, 2000 and January, 2001 when Claimant was also seeking advice on a pain clinic. EX44, p. 141.

On February 9, 2001, Claimant is examined by Dr. Kahn whose assessment is that Claimant had a pain syndrome and was due to degenerative disc at L3-4 with bilateral L4 radiculitis at that level. Dr. Kahn recommended that Claimant continued use of opiate medications as clinically indicated and consideration of a transforaminal steroid injection procedure was put forth. EX19; EX44, p. 143.

On April 12, 2001, there is an MRI report of the lumbar spine read as showing severe disc space narrowing at L3-4 resulting in mild central canal stenosis and moderate to severe right-sided neuroforaminal narrowing, suspecting mechanical irritation of the existing right L3 nerve root. There was also a right paracentral disc protrusion at T12-L1 indenting the right anterolateral thecal sac and degenerative disc disease at L1-2, L2-3, and L4-5. CX13, pp. 97-98; EX44, p. 138

Claimant was examined by David Murphy, M.D., a physician with Progressive Rehabilitation Associates ("PRA"), after completing his three week out-patient multi-disciplinary pain management program for treatment of his chronic low back pain on referral from Employer's Carrier. Dr. Murphy diagnosed Claimant as having an occupational injury on January 7, 1999, with accepted conditions of lumbar strain. Dr. Murphy examined Claimant and reviewed the August 12, 1996 and April 12, 2001 MRIs. His examination revealed evidence of Claimant's decreased range of lumbar spine motion with tenderness to palpation over the thoracolumbar spine from T12 to L1 with increased muscle tension over the right piriformis musculature and the right quadratus lumborum. There was no evidence of lumbar radiculopathy or myelopathy. Dr. Murphy further opined that Claimant had chronic pain syndrome with poor pain management skills, reliance on narcotic medications for pain control, with associated symptoms of depression, anxiety, irritability, and questionable tolerances for return to work as a boilermaker, improved with treatment. EX24, p. 56.

Upon completion of the program at PRA, Dr. Murphy further concluded that Claimant had improved his pain management skills but there was some question as to whether he would apply what he had learned to his daily activities after leaving the program. It was felt that Claimant demonstrated the ability to return to work in the medium/light category of physical demand with a 50 pound lifting limitation. Dr. Murphy opined that as of May 4, 2001, Claimant was considered medically stationary/fixed and stable with objective medical evidence of permanent partial impairment related to the accepted conditions of his occupational injury of January 7, 1999. As a result, Dr. Murphy released him to return to work on a full time basis in the medium/light category of physical demand. EX24, p. 57.

There were continued regular follow-ups with Dr. Dyehouse and on May 7, 2001, the first progress record after the April MRI, he confirms that the MRI shows Claimant had a worsening of his back pathology. He also placed restrictions on Claimant not to lift more than 30 to 50 pounds consistent with Dr. Murphy's earlier recommendation and no climbing straight ladders. CX12, p. 80.

On May 18, 2001, Dr. Dyehouse noted that Claimant had completed the program at PRA and had gotten better. He also noted that Claimant had been treated by Dr. Sugarman for gout, hypercholesterolemia, hypertension, and gastroesophageal reflux disease, along with back medications. Dr. Dyehouse assessed Claimant with chronic back pain with significant to severe degenerative disc disease of the lumber spine. He also noted that Claimant had an evaluation by Dr. Kahn who felt that Claimant was a candidate for epidural steroid injections or facet blocks and that Claimant was interested in that type of treatment. Dr. Dyehouse recommended that Claimant see an orthopedic surgeon to see if any surgical intervention was available. CX12, pp. 81-82; EX44, p. 142.

On June 15, 2001, Claimant was examined and evaluated by Dr. Miller, a neurosurgeon whom also reviewed an unspecified MRI of Claimant's lower back and noted a diffuse bulging of the disc at L2-3 with mild right-sided neuroforaminal narrowing. He further noted that L3-4 showed severe degenerative change with nearly complete collapse of the disc space, facet hypertrophy spurs at vertebral margins and significant foraminal narrowing and hypertrophic endplate changes, minimal degenerative changes at L4-5 and L5-S1 was quite normal. Dr. Miller's impression was severe degenerative lumbar intervertebral disc disease. He stated that while Claimant had been through fairly intensive rehab with no significant improvement, he would not expect much improvement. Instead, he recommended that Claimant apply for Social Security disability, feeling that lumbar fusion was very unlikely to result in enough improvement that Claimant could work effectively for another 10 years at his occupation. He noted that the only other option would be vocational rehabilitation but felt that Claimant could not work as a welder in an unlimited capacity. He also noted very cautious use of narcotic analgesics was recommended, recommending complete weaning off of hydrocodone. CX14, p.100; EX44, p. 144.

On July 1, 2001, Claimant was seen at the Southwest Washington Emergency Room by Dr. Roger Shea and Dr. Teresa Sorensen with complaints of increasing confusion. Dr. Shea examined Claimant and opined that Claimant was inflicted with some form of altered mental status that may be attributed to excess narcotics, possibly excess Ambien. EX28a. Narcan was given to Claimant though this did not rid him of his confusion. Dr. Sorensen evaluated Claimant that same day and assessed him as suffering from delirium. A laboratory workup was performed as there was concern regarding Claimant's narcotic use noting that Claimant alleged to use two tablets per day yet his wife reported that the bottle was three-fourths full at the beginning of the week and was empty by the time of this visit. EX28a, p. 69; EX44, p. 144.

A CT scan of Claimant's head was performed on July 1, 2001 and read as no significant abnormality. A chest x-ray was also performed on that same day and read as showing no acute pulmonary abnormality but borderline cardiomegaly. Laboratory workup was performed including a drug screen which was negative for opiates. EKG on July 2, 2001 and read as showing normal sinus rhythm, incomplete right bundle branch block, and low voltage criteria for left ventricular hypertrophy. EX44, p. 144.

On July 2, 2001, Arul Selvam, M.D. prepared a discharge diagnosis indicating Claimant's altered mental state, confusion, paranoia, probable drug induced from Vicodin, Ambien, and amitriptyline, as well as depression, anxiety, chronic low back pain, hyperlipidemia, and hypertension. Claimant was discharged on Darvocet. Vicodin and Ambien were no longer prescribed for Claimant to use. Amitriptyline was decreased to 25 mg at night on a p.r.n. basis. Id.

Claimant's back pain remained stable in follow-up visits to Dr. Dyehouse in late May, July, August, and October 2001, and January, 2002. There were no new recommendations by Dr. Dyehouse to Claimant at follow-up visits in February, March, and April 2002. CX12, pp.83-86.

A work capacity evaluation ("WCE") of Claimant was performed on October 3 and 4, 2001 by Larry Andes, Physical Therapist, and Leann Klein, Occupational Therapist. They noted that Claimant demonstrated capacities for full-time in the sedentary-light work category and Claimant's noted level of effort during the evaluation was fair. Claimant's range of motion for the evaluation was significantly less than the range of motion obtained at a later DME in October 2002 though even the later range of motion was significantly decreased from normal. EX30, pp. 83-88; EX44, pp. 144-45.

Dr. Gostnell performed a psychological evaluation of Claimant on November 9, 2001 and January 9, 2002. He diagnosed Claimant with a dysthymic disorder with early onset, generalized anxiety disorder, learning disorder not otherwise specified, and cognitive disorder not otherwise specified. He also noted Axis II diagnoses of avoidant and dependent personality features. EX31, pp. 89-100.

On May 24, 2002, Dr. Dyehouse recommended that Claimant redo a physical capacities examination at PRA. On June 25, 2002, Dr. Dyehouse recommended that Claimant undergo a cortisone injection of the back. On July 15, 2002, Dr. Dyehouse notes that Claimant is having memory problems and recommended an MRI for the brain and then performing a stress test for abnormal EKG. CX12, pp. 91-93.

On July 2, 2002, Dr. Jeffrey J. Hansen performed a psychiatric evaluation of Claimant and found him to be suffering from a major depressive disorder, recurrent, and an anxiety disorder NOS with changed medication and psychotherapy recommended to focus on Claimant's marriage status at the time. EX38, pp. 120-122.

On July 24, 2002, Dr. Dyehouse encouraged Claimant to reestablish at the pain clinic for steroid injections. In August 23, 2002, he offers the same recommendation and on September 18, 2002, he notes that Claimant should follow up with Dr. Kahn. Id. Claimant stated that he does not want surgery and fears re-injuring his back. TR p. 35. He says he does a few exercises, uses a heat pad and lies down to manage back pain in addition to taking medication. CX12, pp. 94-96.

On October 24, 2002, Dr. Brad Lorber, a physiatrist, and Dr. Richard Arbeene, an orthopedic surgeon, examined Claimant and assessed him as having chronic low back pain, multilevel degenerative changes of the lumbar spine, and possible degenerative changes at L3-4, severe in nature. These physicians opined that Claimant was capable of performing various light to sedentary positions including gate guard, cashier II and assembler production among others. EX44, pp. 138-155.

On October 24, 2002, Dr. A. Michael Leland, a clinical psychologist, and Dr. Ronald Turco, a psychiatrist, conducted a psychological examination of Claimant and opined that Claimant's psychological conditions pre-existed the date of Claimant's injury and would not interfere with performance of the non-demanding occupations including gate guard and cashier II. EX45, pp. 156-170.

Claimant currently takes Vicodin daily for his back pain. TR pp. 30-31, EX50, p. 262. He also takes Trazodone daily at night to help him sleep and Wellbutrin as an anti-depressant. TR p. 31. Claimant also takes Lipidor daily to control his cholesterol. TR pp. 31-32.

Claimant stated that he can no longer perform yard work at his home nor can he vacuum. He does help make his bed, wash dishes, and help do other household chores but sometimes he gets fatigued. TR p. 33. Claimant testified that he goes grocery shopping two to three times per month with help from others. TR p. 52. He also watches television daily for four to five hours watching news shows, movies and prime-time programming. TR p. 53. Claimant stated that he wears glasses to help him read and that he uses glasses only to read and not to drive. TR pp. 39 and 45. Claimant drives with an unrestricted Washington drivers license. TR p. 45.

Claimant testified that he gambles at casinos in Reno, Nevada somewhere between one to three times per year or locally at Grand Run about two additional times per year since 1999. TR pp. 44, 45, and 50. When Claimant goes to Reno, he usually flies for an hour and fifteen minutes and sits at the casino for a couple of minutes to an hour on and off from Sunday through Friday. TR pp. 44-46. Claimant testified that it takes about one and one-half hours to get to the casino in Grand Run. TR p. 55.

Claimant testified that since 1999 or 2000, his back problems have kept him from his primary hobby of drag racing. He used to drag race a couple of times a week. TR p. 32. In addition, Claimant testified that he has had to reduce his hunting and fishing to day trips over the past four years. He stated that in the past four years, he has gone hunting six to eight times using a 280 rifle. TR p. 51. Since June 2001, Claimant has hunted three or four times. TR p. 54. He testified that he goes hunting with friends to shoot deer while also being licensed to shoot elk. TR pp. 52, 54 and 55.

Claimant was not credible when he testified that he does not help carry hunted game back to the truck and that his hunting is limited to just riding around in the truck. TR pp. 52 and 54. Earlier in his testimony, Claimant said that he cannot do very much because he is worried about re-injuring his back yet later he testified that he hunts, fishes, and gambles throughout the year at distances requiring significant truck, car or airplane travel, activities inconsistent with testimony that Claimant cannot do much with his back because of pain or fear of re-injuring it. See TR p. 35. Claimant also testified that he did not think he was too disabled to return to work yet Employer's Certified Rehabilitation Counselor, Thomas Weiford, concluded after evaluating Claimant that he "perceives himself as too disabled to consider return to work options." TR p. 37 and EX49, p. 238.

Vocational Evidence

Employer's witness, Roy S. Katzen, a Certified Vocational Counselor, testified that he has performed services for claimants represented by Claimant's counsel and Employer's counsel in this case on separate occasions. TR p. 57. Mr. Katzen also testified that in arriving at his opinions in this case, he relied upon reports generated by Certified Vocational Counselor Thomas Weiford as well as the psychological evaluation of Dr. Gosnell. TR p. 58. In addition, Mr Katzen stated that in the course of his work in this case, he contacted Mr. Wolvert, Employer's director of boilermakers and pipefitters to discuss Claimant's prior work with Employer. Id.

Mr. Katzen testified that in his experience when he is confronted with a person like Claimant who has a long-term employment for very few employers, it is usually because they are a skilled employee. TR p. 59. He found that his conversation with Mr. Wolvert was very helpful because he provided Mr. Katzen some insight into Claimant's skills, which are considerable according to Mr. Katzen. Claimant rated in the top 10 percent of workers that Mr. Wolvert had supervised but Mr. Wolvert did note that Claimant had a lot of anxiety and difficulty in testing situations. TR p. 60. Mr. Katzen opined that Claimant was a slow learner who was anxious in

testing situations. Id. Mr. Katzen further testified that in his opinion Claimant tested that he could read competently at the eighth to tenth grade which is competent for the types of jobs that Mr. Katzen was targeting for the purpose of his Labor Market Survey. TR p. 61.

Mr. Katzen further opined that Claimant has wage-earning capacity in the jobs Mr. Katzen prepared a Labor Market Surveys and Job Analysis for. TR p. 62-63. Mr. Katzen opined that Claimant was capable of working various jobs including that of a light production assembly worker at a rate of pay of $7-$8 per hour for the lesser skilled positions, security or gate guard at $8-$10 per hour, and parking lot attendant or cashier at $7.40-$8 per hour. TR p. 63, EX50, pp. 272-273. Mr Katzen found that his analysis is consistent with the various evaluations of Claimant that he reviewed in that the security guard, parking lot attendant type or some assembly production work, bench-type work, are within the physical restrictions that Northwest Occupational Medicine, which saw Claimant at Employer's request, recommended for him at a light restriction level with a reduced percentage of many of the same positions available at the reduced sedentary restriction level. TR pp. 63, 65, 67-71, 73, 76-83. Mr. Katzen indicated that the physical capacities test placed Claimant in a light to sedentary range of work. TR p. 67 and EX50, p. 263. Of the various positions mentioned by Mr. Katzen, he testified that 15%-20% of the parking lot attendant positions can be performed at the sedentary level, 10%-20% of the security guard positions, and 10% of the light production assembly positions with most of these with the option to sit or stand as they chose. TR pp. 82-84.

With respect to Claimant's alleged psychological limitations, Mr. Katzen testified that the listed positions of parking lot attendant and security guard require a low skill level no higher than Claimant's prior work as a boilermaker and would not be ruled out due to Claimant's reported anxiety. TR pp. 77-78, and 80. He opined that it was not critical whether Claimant had ever worked with the public in prior jobs and that Claimant had developed a certain amount of inter-personal skills in the shipyard setting to work safely and efficiently in that setting. TR p. 77. In addition, Mr. Katzen stated that Claimant told him that the Buspar anti-depressant medication was helping him feel calmer with a better mood and that he was unsure whether the anti-depressant was affecting his concentration or attention in October 2002. TR p. 78.

CONCLUSIONS OF LAW

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459 (1968); *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 165, 167 (1989); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989).

I. Causation

The claimant contends that the impairments related to his lumbar spine and alleged psychological conditions were in fact caused, accelerated, or aggravated by cumulative trauma he incurred while performing his job as a boiler maker. In contrast, the employer contends that there is an inadequate factual basis for concluding that the claimant's work duties had any sort of causal relationship with his impairments. Even so, employer contends, claimant only filed one claim for his lumbar spine condition in January 1999, and worked until March 19, 2001, when claimant's new injury first manifested with missed work. Employer refuses to attribute to claimant any work-related psychological condition stating, instead, that the evidence and claimant's lack of credibility prove that any material psychological condition was caused by factors unrelated to Claimant's employment including his marital and related family problems.

Insofar as the Claimant contends that he suffered a work-related injury, he is aided by the provisions of subsection 20(a) of the Longshore Act, which provides that in proceedings to enforce a claim under the Act, "it shall be presumed, in the absence of substantial evidence to the contrary — (a) that the claim comes within the provisions of the Act ...." In order to invoke this presumption, a Claimant must produce evidence indicating that he or she suffered some harm or pain and that working conditions existed or an accident occurred that could have caused the harm or pain. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Thus, the presumption cannot be invoked if a Claimant shows only that he or she suffers some type of impairment. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608 (1982). However, a Claimant is entitled to invoke the presumption if he or she adduces at least "some evidence tending to establish" both prerequisites and is not required to prove such prerequisites by a preponderance of the evidence. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C.Cir. 1990)(emphasis in original). Also, the Claimant need not show that he has a specific illness or disease in order to establish an injury, but need only establish some physical harm. *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). Moreover, an injury need not be traceable to a definite time, but can occur gradually, over a period of time. *See Pittman v. Jeffboat, Inc*., 18 BRBS 212 (1986).

Once Claimant establishes that he has sustained harm, and that the accident occurred or working conditions existed which could have caused it, he has established a **prima facie** case for a work-related injury. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Thus, once the subsection 20(a) presumption has been properly invoked, the relevant employer is given the burden of presenting substantial evidence to counter the presumed relationship between the Claimant's impairment and its alleged cause. *Dower v. General Dynamics Corp*., 14 BRBS 324 (1981). If the presumption is rebutted, it falls out of the case and the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corp*., 14 BRBS 927 (1982). Under the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), the ultimate burden of proof then rests on the Claimant. *See also Holmes v. Universal Maritime Services Corp*., 29 BRBS 18, 21 (1995). However, the subsection 20(a) presumption does not assist Claimants in proving that any

disability resulting from a work injury was in fact permanent. *Holten v. Independent Stevedoring Co.*, 14 BRBS 441 (1981); *Duncan v. Bethlehem Steel Corp*., 12 BRBS 112 (1979). A work-related aggravation of a prior injury is considered to be a new injury under the Act, and is compensable based on Claimant's average weekly wage at the time of the aggravating event. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984); *see also Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

In considering medical evidence concerning a worker's injury, a treating physician's opinion is entitled to "special weight." *Amos v. Director, OWCP, 153 F.3d 1051* (9thCir. 1998). In fact, in the Ninth Circuit, clear and convincing reasons must be given for rejecting an *uncontroverted* opinion of a treating physician. *Magalanes v. Bowen*, 881 F.2d 747, 751 (9thCir. 1989). However, the Ninth Circuit has also held that a treating physician's opinion is not necessarily conclusive and may in some circumstances be disregarded, even if uncontradicted. For example, an administrative law judge may reject a treating physician's opinion that is "brief and conclusory in form with little in the way of clinical findings to support [its] conclusion." *Id.* In addition, an administrative law judge can reject the opinion of a treating physician which conflicts with the opinion of an examining physician, if the ALJ's decision sets forth "'specific, legitimate reasons for doing so that are based on substantial evidence in the record.'" *Id.*

In this case, Claimant alleges that the harm to his lower back resulted from working conditions at the Employer's shipyard on two separate occasions. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

The October 1, 1998 Back Injury

As referenced above, Claimant sustained a work-related injury to his lower back in 1996. Claimant continued to experience pain in his lower back and filed a claim for a new or cumulative injury to his lower back as of October 1, 1998. I find that the evidence in this case establishes that Claimant has presented a prima facie case and he is entitled to invocation of the Section 20(a) presumption linking his harm to his employment. See CX11, pp.55 and 56. Employer has provided no evidence to rebut the Section 20(a) presumption from treating physician Dr. Smith's treatment notes. As a result, Claimant's lower back flare-up problems were caused by a new or cumulative injury on October 1, 1998.

The March 19, 2001 Back Injury

Claimant had a second new claim involving his lower back as of January 7, 1999, the date when Dr. Smith saw Claimant for the specific purpose of filing a new worker's compensation claim and Claimant signed Oregon form 827 giving notice of a new claim. EX9-10, pp.9-12. Claimant's new claim was reported as a no-time-loss claim. See EX1, p.1. Not until March 19, 2001, however, did Claimant first lose any time from work on account of his new lower back

injury when he left work for evaluation at Progressive Rehabilitation Associates ("PRA"). EX4, p. 4; EX22, p. 49. On April 12, 2001, Claimant underwent a lumbar MRI scan, 27 months after making his claim. EX23, p. 51. Claimant lost time again between April 16 and May 6, 2001, for which he was compensated, when he participated in an outpatient pain management program at PRA, after which it was recommended that Claimant limit his work to the light-to-medium category of physical demand. EX4, p. 4; see EX24, pp. 53-55. Thereafter, Claimant participated in Employer's light work program until it ended at the end of June 2001. TR29-30.

Employer argues that this case is controlled by *Johnson v. Director, OWCP*, 911 F.2d 247 (9th Cir. 1990). In *Johnson*, the Ninth Circuit determined that in cases involving a latent traumatic injury, a claimant's average weekly wage is to be calculated at the time the disability becomes manifest, rather than at the time of the accident. The Ninth Circuit reasoned that latent traumatic injuries are similar to occupational diseases, as the effect of the injury or disease is not known until a disability becomes manifest. The claimant worked intermittently after her injury but experienced continued pain and increased swelling in her hands until she had to stop working approximately three and one half years after the date of accident. Thus, the court held that Johnson was not "injured" until several years after her accident when her disability became manifest, and it used the later date for purposes of determining her average weekly wage. Id. at p. 250.

Claimant in this case is one of the "exceptional cases ... where the onset of the disability occurs years after the initial trauma" and, consequently, the date when disability became manifest – when Claimant began to lose time from work – must be taken as the date of his injury for purposes of calculating the average weekly wage. *See Johnson v. Director, OWCP*, 911 F.2d 247, 249 (9th Cir. 1990); compare *DeWeert v. Stevedoring Services of America*, 272 F.3d 1241, 1245-46 (9th Cir. 2001)(distinguishing Johnson in case where time loss began two weeks after injury). Claimant continued to perform his regular work at a full-time basis when work was available. As such, Claimant's continued ability to perform his regular work essentially masked any disability. Claimant did not become disabled until he had first began to lose time from work on March 19, 2001.

I find that the evidence in this case establishes that Claimant has presented a prima facie case as to his second new or cumulative trauma lower back injury and he is entitled to invocation of the Section 20(a) presumption linking his harm to his employment. Employer concedes this second new injury and has provided no evidence to rebut the Section 20(a) presumption from treating physician Dr. Dyehouse's treatment notes. As a result, Claimant's second lower back flare-up problem was caused by a new or cumulative injury that manifested on March 19, 2001.

Claimant's Alleged Psychological Condition

Claimant alleges a psychological condition involving major depression and anxiety that he believes is work-related and, therefore, compensable under the Act. Claimant's lack of credibility, however, is relevant because in diagnosing Claimant's psychiatric condition, the doctors relied on

what Claimant told them. I find that Claimant was not prevented from returning to his former longshore employment by any psychiatric condition. In making this determination, I rely on Claimant's testimony that since 2001, Claimant regularly went hunting and fishing and traveled to various casinos to gamble both in-state and out-of-state assumingly publicly in large groups of people. TR, pp. 44-55. Also, Claimant testified that he watched television regularly particularly shows that require his attention such as news shows, movies, and nighttime programing. TR, p. 53. This is inconsistent with Claimant's statements made to his doctors which formed the basis for a diagnosis of major depression. See EX31, p. 92; EX38, p. 121.

Based on these inconsistent statements by Claimant, I find that he is not a trustworthy witness. I give less weight to EXs 31 and 38, the psychiatric reports from Drs. Gostnell and Hansen, and give greater weight to EX45, the psychiatric report by Drs. Leland and Turco, as the prior reports are based upon partial facts that do not include all of the daily activities and social events that Claimant participated in leading up to his evaluations. Claimant was much more forthcoming about his shopping, gambling, hunting, and fishing activities with Drs. Leland and Turco. As a result, Claimant did not establish any continuing inability to return to work due to any psychiatric condition. Alternatively, even if a psychiatric condition existed, it was related to Claimant's admitted family and marriage problems rather than his employment or physical injuries related to his employment. See EX31, p. 92; EX38, p. 121; and EX45, pp. 163 and 165. Moreover, Mr. Katzen opined that any legitimate psychiatric problems that Claimant may have were either factored into his labor market survey or were irrelevant to the positions mentioned. TR, pp. 75-84.

II. Average Weekly Wage

Employer contends that Claimant's average weekly wage ("AWW") at the time of his industrial injury was $615.91, which is Claimant's annual earnings during the 52-week period leading up to his industrial injury if the date disability commenced was March 19, 2001, divided by 52, per Section 10(c). Claimant argues that his pre-accident weekly earnings are $948.50 calculated using Section 10(a), assuming October 1, 1998 as the date disability commenced, Claimant was a five-day-per-week worker, and using 236 paid days to calculate the average daily wage.

A. Application of Section 10:

Section 10 of the Act sets forth three methods, in subsections 10(a), (b) and (c), for determining a Claimant's average annual earnings; that figure is then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910. The computation methods establish a Claimant's earning power at the time of injury. See *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990); *Orkney v. General Dynamics Corp*., 8 BRBS 543 (1978).

The calculation methods of Sections 10(a) and 10(b) are applicable where an injured employee's work is regular and continuous. Section 10(a) applies if the employee "worked in the employment ... whether for the same or another employer, during substantially the whole of the year immediately proceeding" the injury. 33 U.S.C. § 910(a); *See Empire United Stevedores v. Gatlin*, 936 F.2d 819 (5th Cir. 1991); *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133 (1990). Section 10(a) looks to the actual wages of the injured worker. See 33 U.S.C. § 910(a).

Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year," prior to his injury. Section 10(b) looks to the wages of other workers in the same employment situation and directs that the average weekly wage should be based on the wages of the employee of the same class, who worked substantially the whole year preceding the injury, in the same or similar employment, in the same or neighboring place. See 33 U.S.C. § 910(b).

Section 10(c) should be applied in cases where the methods used in subsections (a) and (b) cannot reasonably and fairly be applied. See 33 U.S.C. § 910(c); *See Newby v. Newport News Shipbuilding & Drydock Co.*, 20 BRBS 155 (1988). The object of Section 10(c) is to arrive at a sum which reasonably represents the Claimant's annual earning capacity at the time of the injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819 (5th Cir. 1991); Richardson v. Safeway Stores, Inc. 14 BRBS 855 (1982).

The October 1, 1998 Injury

A work-related aggravation of a prior injury is considered to be a new injury under the Act, and is compensable based on the Claimant's average weekly wage at the time of the aggravating event. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984); see also *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

As referenced above, this case is further complicated by the fact that I have found that there are two separate injuries to Claimant's back involved here. First there is the October 1, 1998 temporary total disability injury which was a subsequent injury or aggravation of Claimant's initial 1996 work-related back injury. This injury resolved itself with rest by October 12, 1998 as I rely on Dr. Smith's treatment notes to determine that Claimant was capable of resuming, and, in fact, did resume his usual employment duties with Employer as of October 13, 1998. CX 11, p. 56, EX47, p. 188.

Since I find that Claimant worked substantially the whole year preceding the October 1, 1998 injury (See CX4, pp. 4-8; EX47, pp. 176-188), I find that Claimant is entitled to temporary total disability compensation authorized from October 1, 1998 through October 12, 1998. Claimant's paycheck stubs show that from October 2, 1997 through January 7, 1998, he earned $11,276.88 while being paid for 64 days. CX4. Employer's "Daily Detail Labor Display" shows that from January 8, 1998 through September 30, 1998, Claimant earned $33,492.74 over 172

days paid. CX5. All together, Claimant had gross earnings in the pre-disability period (October 2, 1997- October 1, 1998) amounting to $44,769.62. He worked a total of 236 days during that year.[2]

Claimant was a 5-day-per-week worker in 1997-1998. CX1, CX4, and EX47. Therefore, the percentage of available days worked by him in the pre-injury year is 91% (236 days divided by 260 days) and the *Matulic* presumption that § 10(a) applies is not rebutted.[3]

I find that Claimant's AWW is calculated as follows:

$44,769.62 (gross earnings) divided by 236 days worked = $189.70 (average daily wage)
$189.70 (average daily wage) x 260 days/year = $49,322.00 (average annual earnings)
$49,322.00 (average annual earnings) divided by 52 weeks/year (per § 10(d) = $948.50 (AWW)
$948.50 x .666667 = $632.33 (compensation rate/week).

I reject Employer's argument that since Claimant primarily worked four-, five-, six-, and seven-day workweeks for the 52 weeks preceding October 2, 1998, Claimant was neither a five-day nor six-day worker. See ALJ6, pp.5-6. There should be no dispute that Claimant worked the large majority of this 52 week period as at least a five-day worker when one factors in holidays and vacation. See *Matulic v. Director, OWCP, supra at 1057.*

Thus, I find that Claimant's average weekly wage is $948.50, that the TTD rate is $632.33, and that all accrued compensation is payable for Claimant's temporary total disability injury from October 2 through October 12, 1998.

The Subsequent March 19, 2001 Injury

As referenced above, I find that Claimant's second injury to his lower back manifested as of March 19, 2001. The evidence shows that Claimant earned $32,027.48 during the 52 weeks preceding March 19, 2001, or that his average weekly wage under 33 U.S.C. § 910(c) based on these earnings is $615.91 EX47, pp. 215-28, 232. Claimant's earnings records show that he worked only 168 days, well below the "75% of the workdays of the measuring year" requirement set forth in *Matulic* for the presumptive application of § 910(a) as referenced above for Claimant's first injury. *See Matulic, supra* at 154 F.3d at 1058.

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[2]Paid vacation days and holidays are appropriately included in the divisor when making the calculation under § 10(a). *Matulic v. Director, OWCP*, 154 F.3d 1051, 1057 (9th Cir. 1998); *Woolsey v. Ingalls Shipbuilding, Inc.* 33 BRBS 88 (1999) .

[3]Intermittent work consuming more than 75% of available work days requires the application of § 10(a). *Matulic v. Director, OWCP, supra at 1058.*

Moreover, Claimant admitted that shipyard work fluctuates and that he is subject, even with seniority, to periodic layoffs and recalls. TR 38-41. He also stated that there was less work in 2001 than in 1998 and 1999. TR, p. 49. This is plainly the kind of "intermittent and casual" employment for which § 910(c) controls calculation of the average weekly wage. *See Marshall v. Andrew F. Mahoney Co.*, 56 F.2d 74,78 (9th Cir. 1932).

I agree with Employer that Claimant's average weekly wage for the second lower back injury should be calculated pursuant to Section 910(c). Section 910(a) is not applicable because Claimant did not work for substantially the whole year preceding the injury first manifested on March 19, 2001. Likewise, Section 910(b) is not applicable because there is no evidence in the record of wages earned by a comparable employee during the year preceding the injury. Since neither Sections 910(a) nor 910(b) applies, the average weekly wage must be calculated under Section 910(c).

Thus, I find that Claimant's average weekly wage for his second lower back injury is $615.91, that the Permanent Total Disability rate is $410.61, and that all accrued compensation is payable for Claimant's permanent partial disability injury, less payments made, commencing as of July 9, 2001, after Claimant's light duty employment.

III. Section 14(e) Penalty

Claimant argues that Employer controverted his average weekly wage position and claim for temporary total disability from October 1, 1998 to October 12, 1998 on August 10, 2001. ALJX5 p. 5 citing CX3 and EX5. Consequently, Claimant seeks a penalty assessment pursuant to 33 U.S.C §914(e) [§14(e)] equal to 10% of the accrued compensation from October 1, 1998 to August 10, 2001. Id. Additionally, Claimant seeks an award of interest on all accrued unpaid compensation. Id.

Employer responds by stating that Claimant "did not give notice of a new injury and claim benefits until January 1999, and he did not lose time from work on account of that injury until March 2001." ALJX6, p. 5. Moreover, Employer contends that Claimant's new claim was reported as a no-time-loss claim, until March 19, 2001, when Claimant first lost time from work on account of his new injury, for evaluation at Progressive Rehabilitation Associates. See EX1, p. 1.

Section 14(e) of the Act provides:

> If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 percent thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had

no control such installment could not be paid within the period prescribed for the payment.

33 U.S.C. §914(e).

A Section 14(e) penalty, however, will not be assessed where the employer timely controverts the claim, even where the case ultimately results in an unfavorable disposition to the employer. *See Prime v. Todd Shipyards Corp.*, 12 BRBS 190 (1980). A Claimant's request for additional compensation based on a higher average weekly wage followed by the employer's refusal to pay constitutes a controversy for purposes of Section 14, and the employer must file a notice of controversion within 14 days from the date of controversy in order to avoid a Section 14(e) penalty. *See Browder v. Dillingham Ship Repair*, 25 BRBS 88 (1991).

Employer argues that since it never received notice of Claimant's new injury and claim for compensation benefits for any time period prior to January 7, 1999, it was not required to file a notice of controversion within 14 days from the date of controversy in order to avoid a Section 14(e) penalty. In *National Steel & Shipbuilding Co. v. U.S. Dept. of Labor, OWCP*, 606 F.2d 875 (9th Cir. 1979), the Ninth Circuit explained the circumstances under which an employer must file a notice of controversion in order to avoid liability for a penalty. The court stated:

> [T]he notice requirement is not triggered until the employer has reason to believe a controversy will arise, whether because of the employer's own actions in terminating or reducing benefits previously paid voluntarily or because of the employee's protests or claims with respect to compensation. Once the employer has reason to believe that a controversy has arisen or will arise, however, it must file the notice of controversion within 14 days or be liable for the 10 percent assessment computed on all amounts unpaid between the time notice should have been filed and the time notice is filed (or the time the Department of Labor acquires knowledge of the facts that a proper notice would have revealed)..

Id. At 879.

While Claimant may have given notice to Employer of a new injury as of January 7, 1999 (EX3, p.3 and EX10, p.12), he did not offer any documentary or testimonial evidence regarding the alleged notification giving Employer any reason to believe that Claimant was alleging lost compensation benefits from October 1, 1998 to October 12, 1998. Therefore, I find that the Claimant has failed to establish that the Employer was aware of the dispute prior to its August 2001 filing of its Notice of Controversion. (EX5, p. 5). And since liability for a Section 14(e) penalty terminates on the date the employer files the Notice of Controversion or on the date of the informal conference, whichever occurs first (*See National Steel & Shipbuilding Co., supra*), Claimant is not entitled to a Section 14(e) penalty.

*IV. **The Date Of Maximum Medical Improvement**.*

Claimant contends that his work-related impairments have not yet reached the point of maximum medical improvement and he therefore asserts that any wage loss benefits to which he is entitled are for a temporary rather than permanent disability. ALJX1 pp. 1-2. In contrast, Employer contends that any work injury Claimant may have suffered reached the point of maximum medical improvement on May 4, 2001. EX24, p.57; ALJX2 p.1.

A disability will be considered permanent if the employee's impairment has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp*., 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). *See also Crum v. General Adjustment Bureau,* 738 F.2d 474, 480 (D.C. Cir. 1984)(physician's evaluations of Claimant indicated that his heart condition, although improved, was of indefinite duration); *Air America, Inc. v. Director, OWCP*, 587 F.2d 773, 781-782 (1st Cir. 1979); *Care v. Washington Metr. Area Transit Auth*., 21 BRBS 248, 251 (1988).

Permanency does not, however, mean unchanging. Permanency can be found even if there is a remote or hypothetical possibility that the employee's condition may improve at some future date, *Watson,* 400 F.2d at 654; *Mills v. Marine Repair Serv.*, 21 BRBS 115, 117 (1988); *Brown v. Bethlehem Steel Corp*., 19 BRBS 200, 204, aff'd on recon, 20 BRBS 26 (1987). Likewise, a prognosis stating that chances of improvement are remote is sufficient to support a finding that a Claimant's disability is permanent. *Walsh v. Vappi Constr. Co.*, 13 BRBS 442, 445 (1981); *Johnson v. Treyja, Inc*., 5 BRBS 464, 468 (1977).

The question of whether a Claimant's condition has reached the point of maximum medical improvement is primarily an issue of fact and must be resolved on the basis of medical rather than economic evidence. *See Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979); *Ballesteros v. Willamette Western Corp*., 20 BRBS 184 (1988); *Dixon v. John J. McMullen and Associates, Inc.*, 19 BRBS 243 (1986); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). The mere possibility that a Claimant's condition may improve in the future does not by itself support a finding that a Claimant has not yet reached the point of maximum medical improvement. *See Brown,* 19 BRBS at 204. However, a condition is not permanent as long as a worker is undergoing treatment that is reasonably calculated to improve the worker's condition even if the treatment may ultimately be unsuccessful. *See Abbott v. Louisiana Insurance Guaranty Ass'n*, 27 BRBS 192, 200 (1993), *aff'd sub. nom, Louisiana Insurance Guaranty Ass'n. v. Abbott*, 40 F.3d 122, 126 (5th Cir. 1994).

Where surgery is anticipated, maximum medical improvement has not yet been reached. *Kuhn v. Associated Press*, 16 BRBS 46, 48 (1983). However, if anticipated surgery is not expected to improve a Claimant's condition or if a Claimant reasonably refuses to undergo surgery, the condition may be considered permanent. *Phillips v. Marine Concrete Structures*, 21

BRBS 233 (1988); *Worthington v. Newport News Shipbuilding and Dry Dock Company,* 18 BRBS 200 (1986).

Claimant's reliance on *Cooper v. Offshore Pipelines International, Inc*. 33 BRBS 46, 51-52 (1999) is misplaced as that case is factually distinguishable from this case as to the relationship between a claimant's continuing treatment for a back condition and the establishment of a maximum medical improvement date. In *Cooper*, the claimant was just two weeks past an accident to his back when the administrative law judge rejected an earlier date and found that maximum medical improvement had not yet occurred while the claimant continued to receive treatment for his back injury. Here, as referenced below, Claimant was almost five years beyond his initial back injury and by May 4, 2001, while still receiving pain treatment, he had exhausted a number of medical options to help his back with no foreseeable improvement or recommendation for surgery left to explore. As such, Claimant had reached maximum medical improvement as of May 4, 2001.

On or about May 4, 2001, Claimant was examined by David Murphy, M.D., a physician with Progressive Rehabilitation Associates ("PRA"), after completing his three week out-patient multi-disciplinary pain management program for treatment of his chronic low back pain on referral from Employer's Carrier. Dr. Murphy examined Claimant and reviewed the August 12, 1996 and April 12, 2001 MRIs. Dr. Murphy issued a report that stated he had reviewed Claimant's file and examined him. Dr. Murphy indicated that as of May 4, 2001, Claimant's back condition was considered medically stationary/fixed and stable with objective medical evidence of permanent partial impairment related to the accepted conditions of his occupational injury of January 7, 1999. As a result, Dr. Murphy released him to return to work on a full time basis in the medium/light category of physical demand. EX24, p. 57.

On May 7, 2001, the first progress record after the April MRI, Claimant's treating physician, Dr. Dyehouse, confirms that the MRI shows Claimant had a worsening of his back pathology. He also places restrictions on Claimant not to lift more than 30 to 50 pounds consistent with Dr. Murphy's earlier recommendation and no climbing straight ladders. CX12, p. 80. Claimant's back pain remained stable in follow-up visits to Dr. Dyehouse in late May, July, August, and October 2001, and January, 2002. There were no new recommendations by Dr. Dyehouse to Claimant at follow-up visits in February, March, and April 2002. CX12, pp. 81-96.

On June 15, 2001, Claimant was examined and evaluated by Dr. Miller, a neurosurgeon whom also reviewed an unspecified MRI of Claimant's lower back and noted a diffuse bulging of the disc at L2-3 with mild right-sided neuroforaminal narrowing. Dr. Miller's impression was severe degenerative lumbar intervertebral disc disease. He stated that while Claimant had been through fairly intensive rehab with no significant improvement, he would not expect much improvement. Instead, he recommended that Claimant apply for Social Security disability, feeling that lumbar fusion was very unlikely to result in enough improvement that Claimant could work effectively for another 10 years at his occupation. He noted that the only other option would be

vocational rehabilitation but felt that Claimant could not work as a welder in an unlimited capacity. CX14, p.100; EX44, p. 144.

Based upon the evidence, I adopt Dr. Murphy's conclusion and find that Claimant reached maximum medical improvement with respect to his back condition on May 4, 2001. There was no medical opinion from Claimant's treating physician or any other physician indicating either any other date or that Claimant's back condition has not achieved maximum medical improvement as of May 4, 2001. Dr. Miller's opinions as an examining neurosurgeon are consistent with Dr. Murphy's May 4, 2001 maximum medical improvement date in that he noted that despite extensive rehabilitation, no improvement had occurred with respect to Claimant's back condition as of June 15, 2001 and that it was very unlikely that surgery or anything else short of vocational rehabilitation could help Claimant with his back problems. CX14, p. 100. As such in the absence of contrary evidence, I follow the opinions of Drs. Murphy and Miller. Claimant's date of maximum medical improvement is May 4, 2001.

V. Extent of Disability

In order to establish a prima facie case of total disability, Claimant must establish that he or she is unable to return to his or her usual work due to a work-related condition. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980); s*ee also, e.g., SGS Control Serv. V. Director, OWCP*, 86 F.3d 438, 30 BRBS 57 (CRT) (5th Cir. 1996). If Claimant established that he or she cannot return to his or her usual employment, the burden shifts to employer to establish the availability of suitable alternate employment. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980). In deciding if a proffered job opportunity is realistically available, it is also necessary to consider the Claimant's age, education, and background in order to determine if there is a reasonable likelihood that the Claimant would be hired if he or she diligently sought the proposed job. *See Hairston v. Todd Shipyards*, 849 F.2d 1194 (9th Cir. 1988); *Stevens v. Director*, OWCP, 909 F.2d 1256 (9th Cir. 1990). However, an employer need not show the existence of specific and realistically available job opportunities if the employer itself offers the Claimant a bona fide job that the Claimant is capable of performing. *See Darby v. Ingalls Shipbuilding, Inc*., 99 F.3d 685 (5th Cir. 1996); *Diosdado v. Newpark Shipbuilding & Repair, Inc*., 31 BRBS 70 (1997); *McCullough v. Marathon Letourneau Co.*, 22 BRBS 359, 365-66 (1989); *Peele v. Newport News Shipbuilding and DryDock Company*, 20 BRBS 133, 136 (1987); *Darden v. Newport News Shipbuilding and DryDock Company*, 18 BRBS 224, 226 (1986). If it is established that suitable alternative employment is available, the provisions of subsection 8(c)(21) of the Act require that the injured worker's compensation be based on the difference between the worker's pre-injury average weekly wage and his or her post-injury earning capacity.

In this case, the Claimant contends that he was temporarily totally disabled from October 1, 1998 to October 12, 1998, and that since March 19, 2001, he has, once again, been temporarily totally disabled. ALJX 5, p. 10. In contrast, the employer contends that since July 9, 2001 when

Claimant last worked, there were other jobs available to him at various private businesses in the vicinity of his residence. ALJX 6, pp.8-10.

Once again, in order to establish permanent total disability, a Claimant must prove by a preponderance of the evidence that he is unable to perform his usual job due to his work related injury. *See Anderson v, Todd Shipyards Corp*., 22 BRBS 20 (1989). The judge must compare the Claimant's medical restrictions with the specific requirements of his usual employment. *See Curit v. Bath Iron Works Corp*., 22 BRBS 100 (1988). At this initial stage, Claimant need not establish that he cannot return to any employment, only that he cannot return to his former employment. *See Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). Usual employment is the Claimant's regular duties at the time he was injured. *See Ramirez v. Vessel Jeanne Lou, Inc*., 14 BRBS 689 (1982). The Claimant's credible complaints of pain alone may be enough to meet his burden. *See Anderson, supra*. However, a judge may find a Claimant able to do his usual despite his subjective complaints, when a physician finds no functional impairment. *See Peterson v. Washington Metro. Area Transit Auth.*, 13 BRBS 891 (1981).

The parties agree that Claimant cannot return to his usual work as a result of his back injury. Both Claimant's treating physician, Dr. Dyehouse, and Dr. Murphy, an examining physician, restrict Claimant to lifting no more than 30-50 pounds. CX12, p.80; EX24, p. 57. I also note that the weight of the evidence indicates that Claimant cannot return to his usual work as the lifting requirements of a boiler maker are heavy or in excess of 50 pounds. EX29, p. 74. There is no contrary medical evidence in the record. In sum, I find that Claimant cannot return to his usual work.

*VI. **Retained Earning Capacity***

Since Claimant has established that he cannot return to his regular work, he will be considered permanently totally disabled unless Employer establishes suitable alternative employment. *See Clophus v. Amoco Oroduction Co.*, 21 BRBS 261 (1988). The employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980); *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 473 (1978). If the employer meets its burden and establishes suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. *See Edwards v. Director, OWCP*, 999 F.2d 1374(9th Cir. 1993); *Williams v. Halter Marine Service*, 19 BRBS 248 (1987).

The judge may rely on the testimony of vocational counselors that specific job openings exist to establish the existence of suitable jobs. *See Turney v. Bethlehem Steel Corp*., 17 BRBS 232 (1985). The counselors must identify specific available jobs; labor market surveys are not enough. *See Campbell v. Lykes Bros. Steamship Co.*, 15 BRBS 380 (1983). The judge may credit a vocational expert's opinion even if the expert did not examine the claimant, as long as the expert was aware of the claimant's age, education, industrial history, and physical limitations

when exploring the local job opportunities. *See Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

Since Claimant has established that he is unable to return to his former job, Employer has the burden of showing that there are alternative jobs available to him. In this regard, Employer has submitted a report of a vocational consultant which asserts that in November 2002, various other employers within Claimant's geographic area had jobs that would provide suitable alternative employment for Claimant. EX50.

In an effort to show that Claimant can obtain and perform suitable alternative employment with other employers in the Portland Metropolitan area, Employer submitted a report by vocational consultant Roy Katzen which purports to show that from June 2001 through November 19, 2002, the date of Mr. Katzen's report, Claimant is qualified to work three categories of employment: (1) Light Production/Assembly; (2) Security Guard/Gate Guard; and (3) Parking Lot Attendant/Cashier consistent with Claimant's vocational profile and physical restrictions. EX50, pp. 271-273. These positions were chosen based upon their description for low-physical-demand, low-skill jobs that are common in Claimant's geographic area. EX50, p. 271. Because the security guard and gate guard positions have been fairly steady in Claimant's geographical area from 2001 through Mr. Katzen's testimony in December 2002, I find that these jobs were available to Claimant. In addition, I find that an appropriate wage for entry of these jobs as of November 19, 2002, the date of Mr. Katzen's Labor Market Survey, is $8.00 per hour. See TR p. 63, EX50, p. 271. This represents a common earning wage as to both jobs as identified by Mr. Katzen. *Id*.

Mr. Katzen testified that he relied on a number of reports in Claimant's files and found information about Claimant's work from Mr. Wolvert as Claimant's supervisor at Employer very helpful. TR. Pp.58 and 59-60. Mr. Katzen stated that he believed that Claimant's skills were considerable as Mr. Wolvert rated Claimant in the top 10 percent of the welders he had supervised but also noted that Claimant had a lot of anxiety and difficulty in testing situations. Id. Mr. Katzen went on to testify that the results of Claimant's welding testing were not reflective of his ability as a welder. Mr. Katzen believed that Claimant had a slow learning style and was anxious in testing situations. Id. Mr. Katzen concluded that he believed that Claimant's reading skills were competent enough for the types of jobs he was targeting for the purpose of his Labor Market Survey. TR, pp. 60-61. Mr. Katzen added that in his opinion, Claimant has wage-earning capacity in the jobs referenced above in the $7 to $10 per hour range for current wages. TR, pp62-63.

With respect to Claimant's alleged psychological limitations, Mr. Katzen testified that the listed positions of parking lot attendant and security guard require a low skill level no higher than Claimant's prior work as a boiler maker and would not be ruled out due to Claimant's reported anxiety. TR pp. 77-78, and 80. He opined that it was not critical whether Claimant had ever worked with the public in prior jobs and that Claimant had developed a certain amount of inter-personal skills in the shipyard setting to work safely and efficiently in that setting. TR p. 77. In

addition, Mr. Katzen stated that Claimant told him that the Buspar anti-depressant medication was helping him feel calmer with a better mood and that he was unsure whether the anti-depressant was affecting his concentration or attention in October 2002. TR p. 78.

Dr. Murphy opined that as of May 4, 2001, Claimant was considered medically stationary/fixed and stable with objective medical evidence of permanent partial impairment related to the accepted conditions of his occupational injury of January 7, 1999. As a result, Dr. Murphy released him to return to work on a full time basis in the medium/light category of physical demand. EX24, p. 57. In contrast, a work capacity evaluation ("WCE") of Claimant was performed on October 3, 4, 2001 by Larry Andes, Physical Therapist, and Leann Klein, Occupational Therapist. They noted that Claimant demonstrated capacities full-time in the sedentary-light work category and noted level of effort during the evaluation was fair. Claimant's range of motion for the evaluation was significantly less than the range of motion obtained at a later DME in October 2002 though even the later range of motion was significantly decreased from normal. EX44, pp. 144-45. Given Claimant's ability to gamble, hunt, and fish, I find that Claimant can effectively work jobs at the light range of physical demands and exertion level. See TR, pp 46-55.

As a result, it seems likely that a number of the positions listed by Mr. Katzen would be consistent with the Claimant's limitations since they all involve light-sedentary exertion levels. As referenced above, these positions paid in the range of $7.00 to $10.00 per hour at the time of Mr. Katzen's survey. Accordingly, I find that on November 19, 2002, Claimant had an earning capacity in the range of $320 per week.

In calculating a claimant's entitlement to temporary partial disability benefits since May 4, 2001, it is necessary to adjust his current earning capacity to account for any wage inflation that may have occurred between the date of his work injury manifestation and the date that suitable alternative employment became available. *See Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691, 695 (1980); *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 321 (D.C. Cir. 1986). Ordinarily, this adjustment should be made by determining the wage level that prevailed for the alternative employment at the time of the claimant's work-related injury. However, no such evidence is contained in this record. Accordingly, the necessary adjustment must be made by decreasing the claimant's current residual wage earning capacity by an amount proportionate to the increase in the National Average Weekly Wage (NAWW) since the date of the claimant's work injury. See Richardson v. General Dynamics Corp., 23 BRBS 327 (1990). Data published by the Department of Labor show that the NAWW increased from $466.91 on October 1, 2000 to $498.27 on October 1, 2002. Therefore, when adjusted to reflect the changes in the NAWW, Claimant's November 19, 2002 residual wage earning capacity of $320 was equivalent to a weekly wage of $299.85 in May 2001. Claimant's loss of wage earning capacity is thus $316.06 per week (his average weekly wage of $615.91 minus $299.85). Therefore, on May 4, 2001 Claimant's entitlement to permanent partial disability benefits equal to two-thirds of $316.06, i.e., $210.71 per week.

VII. Interest

Interest on a disability award is mandatory. *Sproull v. Director, OWCP*, 86 F.3d 895,900 (9th Cir. 1996); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir. 1991). Nevertheless, Employer did not receive proper notice of Clamant's first back injury until the time of the second injury. I find that Employer would suffer undue detriment if it were required to pay interest accruing from October 13, 1998 when it had no notice that an injury had occurred. Therefore, I find that total interest for the first back injury accrued from August 10, 2001, the date that Employer filed its Notice of Controversion as to both injuries. See EX5, p.5.

ORDER

1. Employer shall pay Claimant temporary total disability compensation for the period beginning on October 1, 1998 and ending on October 12, 1998 at the rate of $632.33 per week (i.e., two-thirds of Claimant's average weekly wage of $948.50). Employer shall pay interest on such amount from August 10, 2001.

2. From July 9, 2001, and until such time as ordered otherwise, Employer shall pay Claimant permanent partial disability compensation of $210.71 per week.

3. Employer shall pay interest on each unpaid installment of compensation set forth in paragraph 2 above from the date the compensation became due until the date of actual payment at the rates prescribed under the provisions of 28 U.S.C. § 1961.

4. Employer shall receive a credit for any compensation paid to Claimant since October 1, 1998.

5. The District Director shall make all calculations necessary to carry out this order.

6. Counsel for Claimant shall within 20 days after service of this Order submit a fully supported application for costs and fees to counsel for Employer and to the undersigned Administrative Law Judge. Within 20 days thereafter, counsel for Employer shall provide Claimant's counsel and the undersigned Administrative Law Judge with a written list specifically describing each and every objection to the proposed fees and costs. Within 20 days after receipt of such objections, Claimant's counsel shall verbally discuss each of the objections with counsel for Employer. If the two counsel disagree on any of the proposed fees or costs, Claimant's counsel shall within 15 days file a fully documented petition listing those fees and costs which are still in dispute and set forth a statement of Claimant's position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by counsel for Employer. Counsel for Employer shall have 15 days from the date of service of such application in which to respond. No reply will be permitted unless specifically authorized in advance.

IT IS SO ORDERED.

A

Gerald Michael Etchingham
Administrative Law Judge

San Francisco, California